Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1276

AL BUCCHINO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

AL BUCCHINO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW AL BUCCHINO, Petitioner, and prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A, infra, 1a) is reported at 606 F.2d 590.

A copy of the opinion, judgment and denial of rehearing duly certified by the Clerk of the United States Court of Appeals for the Fifth Circuit is attached as Petitioner's Appendices A, B and C, pursuant to Rule 21(1) of this Court.

JURISDICTION

The judgment of the Court of Appeals (App. B, infra, 5a) was entered on November 14, 1979. A petition for rehearing was denied on January 18, 1980 and a Motion for Stay of Mandate was granted until and including February 17, 1980 pursuant to the Motion of the Appellant for Stay of the issuance of Mandate pending the filing of application for a Writ of Certiorari. The Court below further provided that said Stay is to continue in force until the final disposition of the case by the United States Supreme Court, provided that within the period subsequent to January 31, 1980 and before February 17, 1980 there shall be filed with the Clerk of the Fifth Circuit Court of Appeals the certificate of the Clerk of the Supreme Court stating that a petition for Writ of Certiorari has been filed with the Clerk of the Supreme Court of the United States. The Order of the Fifth Circuit further provided the mode and manner that said Stay should be terminated which said provisions are not germane to the jurisdiction of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether a conviction must be reversed on direct appeal where the District Court violated Rule 11 of the Federal Rules of Criminal Procedure and where the District Court accepted the guilty plea without fully adhering to the procedure required by Rule 11 particularly in failing to advise the Defendant of the nature, the effect, and the substance of the requirements of a special parole term mandated by the requirements of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Department of Justice Regulations 28 C.F.R. Section 2.56, (1978).

(2) Has this Court substantially overruled the holding of *McCarthy v. United States*, 394 U.S. 469 (1969) in the case of *United States v. Timmreck*, ____U.S. ____, 60 L.Ed.2d 634, 99 S.Ct. 2085 (1979).

STATUTES AND RULES INVOLVED

(1) 21 U.S.C. Section 841(c) provides:

> A special parole term . . . may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been

revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term . . . shall be in addition to, and not in lieu of, any other parole provided for by law.

(2) The Department of Justice regulations, implementing 21 U.S.C. Section 841(c), 28 C.F.R. Section 2.56 (1978) state as follows:

(a) The Drug Abuse Prevention and Control Act, 21 U.S.C. Section 801 to 966, provides that, on conviction of certain offenses, mandatory "special parole terms" must be imposed by the court as part of the sentence. This term is an additional period of supervision which follows the completion of the regular sentence (including completion of any period on parole or mandatory release).

(b) At the time of release under the regular sentence, whether under full term expiration or under a mandatory release certificate or a parole certificate, a separate Special Parole Term certificate will be issued to the prisoner by the Bureau of Prisons.

(c) Should a releasee be found to have violated conditions of release during supervision under his regular sentence, i.e., before commencement of the Special Parole Term, he

will be returned as a violator of his basic supervision period under his regular sentence; the Special Parole Term will follow unaffected, as in paragraph (a) of this section. Should a releasee violate conditions of release during the Special Parole Term he will be subject to revocation on the Special Parole Term.

(3) Rule 11 of the Federal Rules of Criminal Procedure provides in pertinent part:

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him, and if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance

of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

STATEMENT

All references to the Record refer to Petitioner's Record on Appeal by volume and page number.

A 30-count indictment filed in the United States District Court for the Southern District of Texas on January 18, 1978 charged the Petitioner and 11 other co-defendants with conspiracy to possess and distribute cocaine in violation of 21 U.S.C., Section 846. Thirty-eight overt acts were alleged of which six concerned the Petitioner. He was also charged with five counts of intentionally and knowingly using a communication facility, namely a telephone, to cause and

facilitate a conspiracy to possess with intent to distribute and to distribute cocaine, in violation of Title 21 U.S.C. Sections 846, 846(a)(1) and 843(b). (R. Vol. 1, pp. 1-14).

Petitioner was arraigned on January 27, 1978 and entered a plea of not guilty (R. Vol. 1, p. 33). On February 5, 1979, he entered a plea of guilty (R. Vol. 1, p. 186) to count one of the Indictment and for which plea the government agreed to drop the other charges pending against him (R. Vol. 3, p. 11).[1] On March 9, 1979, Petitioner was sentenced to a term of fifteen (15) years imprisonment, a fine in the amount of Twenty Five Thousand Dollars ($25,000.00), and a special parole term of five (5) years. (R. Vol. 4, p. 26). The remaining counts pertaining to the Petitioner were dismissed (R. Vol. 1, p. 214).

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1 In informing Petitioner about the maximum punishment under 2[1] U.S.C. Section 846, the Court failed to inform him of the consequences of the special parole term. The Court informed Petitioner as follows:

> The rule also required that I advise you of the maximum possible penalty provided by law and the maximum possible penalty provided by law, that is, the worse that could happen to you if you were convicted or plead guilty, is 15 years imprisonment, a $25,000 fine and a special parole term of at least three years. Theoretically, the special parole term could be indefinite, could be for the rest of your life. Actually, I am advised by the probation office that they really frown on special parole terms of much more than five years because they find it administratively difficult to handle parole terms much longer than that. So the absolute worse that could happen to you is 15 years imprisonment and $25,000 fine and theoretically a special parole term almost indefinite in length. So do you understand that's absolutely the worse that could happen to you? (R. Vol. 3, p. 7).

Upon appeal timely filed with the Fifth Circuit Court of Appeals, that Court affirmed Petitioner's conviction on November 14, 1979. A petition for rehearing was denied on January 18, 1980 and a Motion for Stay of Mandate was granted until February 17, 1980 pending the filing of a petition for Writ of Certiorari with the Clerk of the Supreme Court of the United States. Said petition is properly before this Court.

REASONS FOR GRANTING THE PETITION

1. The ruling of the Fifth Circuit Court of Appeals holding that the requirements of Rule 11 of the Federal Rules of Criminal Procedure were complied with is a significant departure from prior rulings of the United States Supreme Court, several other circuits, and the Fifth Circuit itself. Moreover, the decision of the court below is of great practical importance because of its broad implications for the finality of judgments in large numbers of federal criminal cases. Guilty pleas form the basis for the substantial majority of federal convictions, and Rule 11 requires the district courts to comply with the requisite procedures, prior to accepting such pleas.

Because so many federal indictments are resolved by pleas of guilty, cf. *McCarthy v. United States*, 394 U.S. 459, 463, 89 S.Ct. 1166, 22 L.Ed.2d 418, 424 (1969) at n. 7, the "fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in

according equal justice to all" accused persons. Notes of the Advisory Committee on 1966 Amendments to F.R.Crim.P. Procedures which do not insure meticulous compliance with Rule 11 threaten the requirement of thorough, knowing voluntariness, and consequently jeopardize the integrity of the adversary process itself.

Because the strength of our system of criminal law is directly proportional to the degree to which the presumption of innocence is protected at trial, the practice of concluding most criminal prosecutions by pleas of guilty potentially threatens the foundations of the adversary process. As this Court noted in *McCarthy v. United States*, 394 U.S. 459, 463, 89 S.Ct. 1166, 22 L.Ed.2d 418, 424 (1969) at n. 7, the vast majority of federal prosecutions are resolved by pleas of guilty. In fiscal 1978, for example, 85.2% of all federal convictions were obtained by pleas of guilty or nolo contendere. 1978 Annual Report of the Director of the Administrative Office of the United States Courts at 114.

Offering a plea of guilty relieves the government of its burden of proof, as the defendant expressly or impliedly waives all of her or his constitutional, statutory and court-rule-created rights and convicts himself or herself out of his or her own mouth. As such, the "fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all" accused persons. Notes of the Ad-

visory Committee on 1966 Amendments to F.R.Crim.P.

In *McCarthy v. United States, supra,* the Court held that "a defendant whose plea has been accepted in violation of Rule 11 [of the Federal Rules of Criminal Procedure] should be affored the opportunity to plead anew * * *" at 472.

As the Supreme Court noted in *McCarthy,* thoughtful and careful compliance with Rule 11 will best serve the fair and efficient administration of justice because it will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

In order for a guilty plea to be voluntary, the accused must be "fully aware of the direct consequences" of the plea, *Brady v. United States,* 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d 747, 760 (1969), including not only the maximum sentence and fine to which he or she is exposed but also any applicable mandatory special parole term. This follows because the special parole term is a "'factor that necessarily affects the maximum term of imprisonment,' ". *Bunker v. Wise,* 550 F.2d 1155, 1158

(9th Cir. 1977), citing *United States v. Myers,* 451 F.2d 402, 404 (9th Cir. 1972).

The mandatory special parole term, whose "nature and operation . . . are very different: from traditional parole, *Bunker v. Wise, supra,* 550 F.2d at 1158, "place [s] a number of onerous burdens on the liberty of paroled individuals," *United States ex rel. Baker v. Finkbeiner,* 551 F.2d 180, 184 (7th Cir. 1977), and substantially enhances the total possible period of incarceration faced by a plea-offering defendant. Depending on the nature of the offense involved, it must be for at least two or three years in length, 21 U.S.C. Section 841(b)(1) (A) and (B), and it may be for as long as life. Cf., e.g., *United States v. Rea,* 532 F.2d 147 (9th Cir. 1976). Violation of the special parole term at any point during the term potentially subjects the defendant to incarceration for the entire period of the special parole term. 21 U.S.C. Section 841(c). Moreover, the risk of further incarceration is significant: "[A] substantial number of parolees . . . return to prison for parole violations. Many of these violations are inevitably technical rather than criminal," *United States ex rel. Baker v. Finkbeiner, supra,* citing President's Commission on Law Enforcement and Justice, Task Force Report: Corrections (1967) at 62 and Note, "Parole: A Critique of Its Legal Foundations and Conditions," 38 N.Y.U.L. Rev. 702, 721 (1963).

For these reasons, failure to advise an accused of the effect of a mandatory special parole term accom-

panying any custodial sentence deprives the accused of highly significant information relative to the potential term of imprisonment faced and fundamentally undercuts the voluntariness of his of her plea.

In *McCarthy v. United States, supra,* the Court rejected the argument that substantial compliance with the provisions of F.R.Crim.P. Rule 11 is a sufficient record of voluntariness in the absence of a showing of prejudice by the defendant. This Court rejected that argument, holding that:

> prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. 394 U.S. at 471-472, 22 L.Ed.2d at 428

The Court also stressed that requiring a showing of prejudice would involve the courts in an after-the-fact fact-finding process in a " 'highly subjective area' " and would encourage unwarranted speculation as to whether the defendant's plea was otherwise truly voluntary. 394 U.S. at 469-471, 22 L.Ed.2d at 427-428.

In informing Petitioner about the maximum punishment under 21 U.S.C. Section 846, the Court failed to inform him of the consequences of the special parole term. The Court failed to ascertain that Petitioner understood that a special term, unlike an ordinary parole

term, increases the possible period of confinement and that Petitioner might have to serve not only the original sentence but also a substantial period beyond that original sentence without credit for time spent on parole. *Moore v. United States,* 592 F.2d 753 (4th Cir. 1979). The district court's omission of such an explanation, *followed by its imposition of a combined sentence of imprisonment and special parole that exceeded the 15-year maximum of which the defendant had been advised, did not comply with Rule 11(c)(1).* See also *Boykin v. Alabama,* 395 U.S. 238, 243-244 (1969).

In *Moore* that Court stated:

> Special parole is a significant penalty. See *United States v. Sheppard,* 588 F.2d 917 (4th Cir. 1978); *Bell v. United States,* 521 F. 2d 713, 715 (4th Cir. 1975). Unlike ordinary parole, which does not involve supervision beyond the original prison term set by the court and the violation of which cannot lead to confinement beyond that sentence, special parole increases the possible period of confinement. It entails the possibility that a defendant may have to serve his original sentence plus a substantial additional period, without credit for time spent on parole. Explanation of special parole in open court is therefore essential to comply with the Rule's mandate that the defendant be informed of "the maximum possible penalty

provided by law." Cf. *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).

In a case presenting the possibility of special parole, the district judge should, after explaining the minimum and maximum possible imprisonment and fine for the offense in accordance with Rule 11, inform the defendant and determine that he understands the following:

> (1) that a special parole term will be added to any prison sentence he receives;
>
> (2) the minimum length of the special parole term that must be imposed and the absence of a statutory maximum;
>
> (3) that special parole is entirely different from — and in addition to — ordinary parole; and
>
> (4) that if the special parole is violated, the defendant can be returned to prison for the remainder of his sentence and the full length of his special parole term.

Supra, 502 F.2d at 755.

The mandate of Rule 11 "is designed to insure that the pleader is made aware of the outer limits of punishment." *Berry v. United States*, 412 F.2d 189, 192 (3rd Cir. 1969). Citing *Berry v. United States, supra*, at 192, the Third Circuit in *Roberts v. United States*, 491 F.2d 1236, 1238 (3rd

Cir. 1974) stated, "when one enters a plea of guilty he should be told what is the worst to expect. At the plea he is entitled to no less — at sentence he should expect no more."

Without a complete explanation of the effects of a special parole term, Petitioner was unable to make an intelligent election between a plea and trial. His plea was therefore not entered knowingly and in conformity with the requirements of Rule 11 requiring reversal of the judgment against Petitioner.

The Court's omission is particularly significant in the case at bar since the combined sentences of imprisonment and special parole actually received by the Petitioner exceeded the maximum prison term of which the Appellant had been advised.

As a result of the trial court's failure to adequately inform Petitioner of the meaning of a special parole term, Petitioner did not fully understand the possible consequences of his guilty plea. The Second Circuit in *United States v. Journet*, 544 F.2d 633 (2nd Cir. 1976) recognized the fundamental rights of a defendant at stake when it stated:

> . . . Since a guilty plea amounts to a conviction which may have most serious consequences for the accused — in this case eight years of imprisonment followed by seven

> years of parole — the acceptance of the plea cannot be dealt with in a hasty or cavalier fashion. Fundamental constitutional rights are at stake, the loss of which could hardly be classified as insubstantial or harmless. What is required is "the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence," *Boykin v. Alabama*, 395 U.S. at 243-44, 89 S.Ct. at 1712.

Petitioner should be allowed to withdraw his plea of guilty because said plea was not entered knowingly in conformity with the requirements of Rule 11, Federal Rules of Criminal Procedure. See *United States v. Del Prete*, 567 F.2d 928 (9th Cir. 1978); *United States v. Richardson*, 483 F.2d 516 ((8th Cir. 1973); *United States v. Watson*, 548 F.2d 1058 (D.C. Cir. 1977); *United States v. Journet, supra*; *United States v. Crusco*, 536 F.2d 21 (3rd Cir. 1976); and *United States v. Vera*, 514 F.2d 102 (5th Cir. 1975).

2. *McCarthy* has been most frequently relied upon in cases where, as in that case and in this case now before the Court, the defendant sought relief because of a Rule 11 violation by the avenue of direct appeal. It has been held that in such circumstances a defendant's conviction must be reversed whenever the "district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11," *United States*

v. Boone, 543 F.2d 1090 (4th Cir. 1976), and that in this context any reliance by the government on the Rule 52(a) harmless error concept "must be rejected." *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976).

However, this Court's recent ruling in *United States v. Timmreck*, ____U.S. ____, 60 L.Ed.2d 634, 99 S.Ct. 2085 (1979) appears to narrow, if not substantially erode, the holding in *McCarthy*. The *Timmreck* decision dealt particularly with a collateral attack brought by a defendant under 28 U.S.C. Section 2255 on the ground that the trial judge had violated Rule 11 by accepting his plea without informing him of the mandatory special parole term. This Court held that such collateral relief is not available especially when there is no showing of special prejudice to the defendant.

While the cases in this area have in recent years distinguished between direct appeal and collateral attack situations, the Fifth Circuit in the case at bar ignores not only *McCarthy*, but in addition a line of cases from the Fifth Circuit itself involving collateral attacks in which that Court held that failure to comply with Rule 11 requirements means that a defendant must be allowed to plead anew regardless of material prejudice. See *Keel v. United States*, 572 F.2d 1135 (5th Cir. 1978); *Coody v. United States*, 570 F.2d 540 (5th Cir. 1978); and *Canady v. United States*, 544 F.2d 203 (5th Cir. 1977).

The Supreme Court in *Davis v. United States*, 417 U.S. 333 (1974) held that the failure to comply with the for-

mal requirements of a rule of criminal procedure does not warrant *collateral* relief absent a showing of" 'a fundamental defect which inherently results in a complete miscarriage of justice' ". (417 U.S. at 346, quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). In recognizing a substantial conflict between *McCarthy* and *Davis*, the Sixth Circuit in *Timmreck v. United States, supra*, said:

> We reconcile McCarthy and Davis by holding that a Rule 11 violation is per se prejudicial and thus must be a "fundamental defect which inherently results in a complete miscarriage of justice." We feel that any other reconciling of the two cases which emphasizes Davis over McCarthy should come only from the Supreme Court. At 377.

Thus, the Supreme Court in *Timmreck* did seem to emphasize *Davis* over *McCarthy* as to collateral attack cases. While clarifying the issue with respect to collateral relief, *Timmreck* leaves uncertain the standard to be applied in direct appeal cases like the one before the Court. Is the holding in *McCarthy* still the rule in direct appeal cases? If *McCarthy* is still viable, then Petitioner Bucchino should be given the chance to plead anew. The Court should accept this invitation to further resolve this important and disputed question of federal criminal law.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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ATTORNEY FOR
PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one copy of the foregoing Petition for Writ of Certiorari was served on Hon. A. J. "Tony" Canales, United States Attorney, 515 Rusk Avenue, Houston, Texas 77002, and three copies were served on Hon. Wade H. McCree, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530 this the ____ day of February, 1980.

CLYDE W. WOODY

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Al BUCCHINO,
Defendant-Appellant.

No. 79-5199
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Nov. 14, 1979.

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN, FAY and RUBIN, Circuit Judges.

PER CURIAM:

Allen Joseph Bucchino pleaded guilty to a charge of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. §846, and was sentenced to 15 years imprisonment and a fine of $25,000, the maximum sentence possible, with a special parole term of 5 years. The government instituted a separate civil proceeding for forfeiture of his 1974 Oldsmobile on the ground that it had been used unlawfully during the

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* Fed.R.App.P. 34(a); 5th Cir. R. 18.

course of the conspiracy. He appeals his conviction, contending that the indictment was deficient because it did not state that his property interest in the Oldsmobile was subject to forfeiture. He also challenges the sentence imposed by the district judge, which he asserts was based on untrue assumptions. We find these contentions to be groundless.

Rule 7(c)(2) of the Federal Rules of Criminal Procedure requires that, when an offense is charged that may result in criminal forfeiture, the indictment shall allege the extent of the property interest subject to forfeiture. However, this rule does not apply to civil forfeiture of property for violation of a statute of the United States. Fed.R.Crim.P. 54(b)(5). Moreover, the statutory provision to which Bucchino pleaded guilty contains no forfeiture provision. *United States v. Hall*, 9 Cir. 1975, 521 F.2d 406, which is cited by Bucchino, involved a statute that had a forfeiture provision.

All of the requirement of the law were complied with in imposing the sentence. Bucchino was given an opportunity for allocution, and he and his counsel addressed the court at length. The court carefully weighed the presentence report, the evidence and the remarks of counsel. It was not required to do more.

The court did impose a long sentence. This was within its discretion. *United States v. Hayes*, 5 Cir. 1979, 589 F.2d 811, 826-27. There is neither claim nor evidence that its action was arbitrary or capricious or amounted to an abuse of discretion.

In imposing the sentence, the district judge chose commendably to give his reasons for the sentence, e.g., "I simply cannot accept your account of your involvement. I think it was much more pervasive than what you have asserted to me." This is challenged because the judge said, "I think," indicating mere belief, and the remark, therefore, amounts to speculation. This is, to put it baldly — as it should be put — nonsense. The law does not require a trial judge to give his reasons for imposing a particular sentence. We think it laudable for a judge to do so, as the trial judge here did. He can only express his opinion. He is not, of course, required or expected to know that one sentence is demonstrably better than another beyond a reasonable doubt or by a preponderance of the evidence or any such evaluation standard.

Belatedly, by supplemental brief, Bucchino questions whether the court's acceptance of the guilty plea complied with Rule 11 of the Federal Rules of Criminal Procedure. Because these issues were raised so late, we would, in the usual course, refuse even to permit the brief to be filed. *See* Fed.R.App.P. 28; *United States v. Luther*, 9 Cir. 1975, 521 F.2d 408, 411; *Mississippi River Corp. v. F.T.C.*, 8 Cir. 1972, 454 F.2d 1083, 1093-94. However, because the entire record is now before us, because the same issues would assuredly be raised by post-conviction motion for relief under 18 U.S.C. §2255 if we did not now consider them, and because it will save the defendant, the government and the court

time to do so now, we have permitted the supplemental brief to be filed and have considered Rule 11 issues raised in it.

The succinct answer to these contentions, sufficient in the light of their lack of real basis, is that they are without merit. The trial judge personally assured himself that the defendant understood the conspiracy charge. It was not necessary for the judge to use the words of the indictment charging that Bucchino entered the conspiracy "willfully, knowingly and intentionally" so long as he informed the defendant that the defendant was charged with deliberately entering into the conspiracy and assured himself that Bucchino had done so. This was sufficient not only under the standard applied by the court en banc in *United States v. Dayton*, 5 Cir. 1979, en banc, 592 F.2d 253, at 256, but also under the interpretation of Rule 11 adopted by the dissent in that case.

The judge did not merely address routine questions to the defendant, nor satisfy himself with a single response. *See United States v. Lincecum*, 5 Cir. 1978, 568 F.2d 1229, 1231. He properly advised the defendant that there is no mandatory minimum penalty for violation of 21 U.S.C. §846; the requirement of special parole *if* a sentence of confinement is imposed is not a "mandatory minimum penalty provided by law." *See* Fed.R.Crim.P. 11(c)(1); *United States v. Adams*, 5 Cir. 1978, 566 F.2d 962, 968. The judge correctly and sufficiently explained the special parole term in explaining

the maximum possible penalty provided by law. It was not necessary for him to explain all the supervisory aspects of special parole or the consequences of a violation. Before December 1, 1975, the rule required that the defendant be informed of "the consequences of the plea." That requirement does not appear in the present rule, and the court need not attempt to explain all the consequences that may flow either from conviction or from the imposition of the sentence, so long as it explains the maximum possible sentence. *United States v. Adams*, 5 Cir. 1978, 566 F.2d 962, 968-69; *Sanchez v. United States*, 9 Cir. 1977, 572 F.2d 210.

For these reasons, the judgment of the trial court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5199
Summary Calendar

D.C. Docket No. CR-H-78-10

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

AL BUCCHINO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before COLEMAN, FAY and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas and was taken under submission upon the record and briefs filed; pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 14, 1979

Issued as Mandate:

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

January 18, 1980

TO ALL PARTIES LISTED BELOW:

No. 79-5199 — U.S.A. v. AL BUCCHINO

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ SALLY HAYWARD
Deputy Clerk

cc: Mr. Louis Dugas, Jr.
Mr. Marvin O. Teague

Mr. Roy Beene
Mr. Clyde Woody
Mr. John Potter

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

January 31, 1980

Mr. Clyde Woody
Attorney at Law
1290 Pennzoil Place
711 Louisiana St.
Houston, TX 77002

No. 79-5199 — UNITED STATES OF AMERICA
v. AL BUCCHINO

MANDATE STAYED TO AND
INCLUDING February 17, 1980
(SEE ORDER ENCLOSED)

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this

court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court, effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore, will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ BRENDA HAUCK
Deputy Clerk

/bh

enc.

cc: Mr. Louis Dugas, Jr.
Mr. Marvin O. Teague
Mr. John M. Potter

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5199

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

AL BUCCHINO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

ORDER:

* * *

The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including FEBRUARY 17, 1980, the stay to continue in force until the final disposition of the

case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

* * *

/s/ ALVIN B. RUBIN
UNITED STATES
CIRCUIT JUDGE

Supreme Court, U. S.
FILED
APR 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-1276

In the Supreme Court of the United States

OCTOBER TERM, 1979

AL BUCCHINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1276

AL BUCCHINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in accepting his guilty plea without first explaining that a special parole term, if violated, could result in incarceration beyond the term of imprisonment originally imposed.

Following indictment in the United States District Court for the Southern District of Texas, petitioner pleaded guilty to one count of conspiracy to possess with intent to distribute and to distribute cocaine, in violation of 21 U.S.C. 846.[1] He was sentenced to 15 years'

---

[1]Five counts of using a telephone to cause and facilitate a conspiracy to possess with intent to distribute and to distribute cocaine were dismissed upon acceptance of the plea.

imprisonment to be followed by a special parole term of five years and fined $25,000.[2] The court of appeals affirmed (Pet. App. 1a-5a; 606 F. 2d 590).

At the plea hearing, the district court advised petitioner that there was no mandatory minimum penalty for the crime with which he was charged and also described the maximum possible penalty for it, as required by Rule 11(c)(1) of the Federal Rules of Criminal Procedure (III-R. 6-7):

> The rule also requires that I advise you of the maximum possible penalty provided by law and the maximum possible penalty provided by law, that is, the worst that could happen to you if you were convicted or pleaded guilty, is 15 years imprisonment, a $25,000 fine and a special parole term of at least three years. Theoretically, the special parole term could be indefinite, could be for the rest of your life. Actually, I am advised by the probation office

[2]The question whether a special parole term may be imposed for the offense of conspiracy to possess or distribute narcotics, in violation of 21 U.S.C. 846, is currently before the Court in *Bifulco* v. *United States*, No. 79-5010 (argued Feb. 27, 1980). Petitioner has not raised that issue here, and, unless the Court deems the issue presented herein otherwise worthy of review, there is no reason for the Court to hold this case pending a decision in *Bifulco*. If the Court holds in *Bifulco* that a special parole term may not be imposed for a conspiracy conviction, petitioner can have his sentence corrected by filing a motion in the district court pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

On the other hand, were the Court inclined to grant review on the issue presented herein, it should hold the case for the decision in *Bifulco*, because, if the special parole term is held inapplicable to narcotics conspiracy convictions, petitioner would not have been even arguably misinformed about the length of the sentence that could accompany his conviction.

> that they really frown on special parole terms of much more than five years because they find it administratively difficult to handle parole terms much longer than that. So the absolute worst that could happen to you is 15 years imprisonment and $25,000 fine and theoretically a special parole term almost indefinite in length. So do you understand that's absolutely the worst that could happen to you?

Petitioner acknowledged that he understood this penalty. Neither petitioner nor his retained counsel asked the court to explain the special parole term further.

Petitioner now contends that the district court should have advised him that the special parole term, if violated, could result in a term of imprisonment beyond his 15-year sentence, with no credit for time served on parole prior to the violation. But Rule 11 contains no such requirement. The 1966 version of Rule 11 required trial courts to advise defendants of "the consequences of the plea." In 1975, Congress revised Rule 11 and in subsection (c)(1) specifically defined those consequences as "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." This is the only explanation of sentencing required by the Rule. The Advisory Committee on the Criminal Rules made clear that it did not intend to require the district courts to elaborate further on the collateral consequences of sentences. See Notes of Advisory Committee on the Criminal Rules (1975 Amendments), 62 F.R.D. 271, 279 (1974). Thus, petitioner, who was advised by the district court that he was exposing himself to a maximum possible penalty of a $25,000 fine, 15 years' imprisonment, and a special parole term of life and who stated, in the presence of counsel, that he understood the sentence, was

entitled to nothing more. *United States* v. *Broussard*, 582 F. 2d 10, 12 (5th Cir. 1978), cert. denied, 440 U.S. 935 (1979); *United States* v. *Adams*, 566 F. 2d 962, 969 (5th Cir. 1978); *Johnson* v. *United States*, 539 F. 2d 1241, 1243 (9th Cir. 1976), cert. denied, 431 U.S. 918 (1977); *Michel* v. *United States*, 507 F. 2d 461, 464 (2d Cir. 1974); cf. *Sanchez* v. *United States*, 572 F. 2d 210 (9th Cir. 1977).

The decision below does not conflict with prior decisions of this Court or of the other courts of appeals. All of the cases concerning mandatory special parole terms on which petitioner relies involve claims of Rule 11 violations based on failure to provide information that *was provided* in the present case.[3] For example, *Moore* v. *United States*, 592 F. 2d 753 (4th Cir. 1979), on which petitioner primarily relies, was an appeal from a denial of

[3]Applicable mandatory special parole sentences were not even mentioned by the trial courts in *Bunker* v. *Wise*, 550 F. 2d 1155 (9th Cir. 1977), *United States ex rel. Baker* v. *Finkbeiner*, 551 F. 2d 180 (7th Cir. 1977), *Roberts* v. *United States*, 491 F. 2d 1236 (3d Cir. 1974), and *United States* v. *Watson*, 548 F. 2d 1058 (D.C. Cir. 1977). The defendants in *United States* v. *Del Prete*, 567 F. 2d 928 (9th Cir. 1978), and *United States* v. *Journet*, 544 F. 2d 633 (2d Cir. 1976), were not apprised of the potential length of the special parole term, as well as other information that they argued was required by Rule 11. The defendant in *United States* v. *Crusco*, 536 F. 2d 21 (3d Cir. 1976), had pleaded guilty in exchange for a maximum sentence of seven years and an assurance that he would be permitted to withdraw his plea if he received a sentence of more than seven years. The defendant was sentenced to six years' imprisonment and three years' special parole and immediately moved to withdraw his plea. Noting that "neither the Government nor the district judge specified that the maximum sentence of *confinement* would be seven years" (536 F. 2d at 24), the Third Circuit held that the defendant was entitled to withdraw his plea because he reasonably might have misunderstood the promised maximum sentence of seven years to include the three-year special parole term, rather than being in addition to it.

a 28 U.S.C. 2255 petition to vacate a sentence of 15 years' imprisonment and three years' special parole on the ground that the defendant had not understood the maximum penalty for the offense because it had not been explained to him. Although the trial court had advised Moore that the relevant criminal statute required a special parole term of at least three years, it had not advised him that there was no maximum on the special parole term.[4] Finding that there was "no evidence that Moore in fact understood the maximum penalty at the time he entered his plea" (592 F. 2d at 756), the Fourth Circuit remanded the case for reduction of the prison sentence to twelve years, so that the combined sentence of imprisonment and special parole would equal the 15-year maximum of which the defendant had been advised or, in the alternative, for setting aside the plea and permitting the defendant to plead again.[5] While we do not mean to imply agreement with the Fourth Circuit's holding that the failure to advise a defendant of the absence of a maximum on the mandatory special parole term constitutes a violation of

[4]The trial court advised Moore of the applicable penalties as follows:

> THE COURT: Well, under the law on which this first court [*sic*] is based . . . the possible maximum penalty is a fine of up to $25,000 or imprisonment for up to 15 years, and if any period of confinement is imposed, the law requires the imposition of a special parole term of at least three years. Do you understand that's the possible maximum penalty under the law in this case?
>
> DEFENDANT MOORE: Yes, sir.

595 F. 2d at 754.

[5]Accord, *United States* v. *Richardson*, 483 F. 2d 516 (8th Cir. 1973).

Rule 11, the facts of the present case, in which petitioner was advised clearly that "the worst that could happen" to him included a special parole term lasting for the rest of his life, are materially different.

Contrary to petitioner's suggestion (Pet. 17-18), this is not a suitable occasion for considering whether the holding of *United States* v. *Timmreck*, 441 U.S. 780 (1979), that not every technical violation of Rule 11 warrants relief on collateral attack should be applied to direct appeals as well, since there was no Rule 11 violation, technical or otherwise, in this case.[6]

[6]The courts of appeals are divided on the question whether every violation of Rule 11 requires automatic reversal on direct appeal. The Fifth, Eighth and Ninth Circuits have not adopted a standard of automatic reversal. See *United States* v. *Dayton*, 604 F. 2d 931 (5th Cir. 1979) (en banc), cert. denied, No. 79-944 (Feb. 25, 1980); *United States* v. *Cammisano*, 599 F. 2d 851, 855 (8th Cir. 1979); *United States* v. *Scharf*, 551 F. 2d 1124, 1129-1130 (8th Cir.), cert. denied, 434 U.S. 824 (1977); *United States* v. *Lambros*, 544 F. 2d 962 (8th Cir. 1976), cert. denied, 430 U.S. 930 (1977); *United States* v. *Conrad*, 598 F. 2d 506 (9th Cir. 1979). On the other hand, some circuits have imposed an "automatic reversal" rule. See *United States* v. *Gray*, 611 F. 2d 194 (7th Cir. 1979), cert denied, No. 79-6057 (Apr. 21, 1980); *United States* v. *Fels*, 599 F. 2d 142, 149 n.5 (7th Cir. 1979); *United States* v. *White*, 583 F. 2d 819, 824 (6th Cir. 1978); *United States* v. *Boone*, 543 F. 2d 1090, 1092 (4th Cir. 1976). The Second Circuit has taken conflicting positions on the issue. Compare *United States* v. *Michaelson*, 552 F. 2d 472 (2d Cir. 1977), and *United States* v. *Saft*, 558 F. 2d 1073 (2d Cir. 1977), with *United States* v. *Palter*, 575 F. 2d 1050 (2d Cir. 1978), and *United States* v. *Journet*, 544 F. 2d 633, 635 (2d Cir. 1976). The Third Circuit, sitting en banc, recently considered the issue, but was evenly divided and affirmed without opinion. *United States* v. *Altro*, No. 78-2386 (Nov. 14, 1979), cert. denied, No. 79-5892 (Mar. 17, 1980). Previously, the Third Circuit had followed the "automatic reversal" rule. See *United States* v. *Keller*, 594 F. 2d 939, 942 (3d Cir. 1979). But see *United States* v. *Dawkins*, 448 F. Supp. 1343 (E.D. Pa.), aff'd, 577 F. 2d 729 (3d Cir. 1978) (Table).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980